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CURRENT TOPICS.

The recent filings of opinions by the Federal Supreme Court have been singularly rich in cases of general interest. In Davis v. Wells, decided on November 14th, it was held that where A, on a consideration of $1 to him in hand paid, executes and causes to be delivered to B an unconditional agreement to guarantee the payment, up to a specified amount, of C's present and future indebtedness to said B, it is not necessary for B to formally notify guarantor A of his acceptance of the terms of the agreement, or to keep the latter informed, from time to time, of the amount of C's fluctuating indebtedness. In the opinion of this court, the written instrument in question is not merely an offer to do a certain thing which, to be valid, must be formally accepted by the party for whose benefit it is made. It is, on the contrary, a completed contract by virtue of the acknowledgment which it contains of the receipt by guarantor of a valuable consideration for services to be rendered. The payment of guarantor of a stipulated consideration is sufficient notice to him that his agreement is accepted, and he is, by the instrument itself, estopped from denying that the consideration was received. The fact that the consideration is merely nominal makes no difference. A stipulation "in consideration of one dollar," is just as effectual as if the sum were larger. With regard to obligation of guarantee to notify guarantor of default of debtor, the court holds that where guarantor suffers loss or damage by reason of the failure of the guarantee to give him such notification, he is to that extent released, but both laches of plaintiff and loss of defendant must concur to constitute a defense. The judgment of the court below was affirmed.

The liability of connecting lines of common carriers for the safe carriage of through freight, and the effect of their relations with each other upon the rights of third parties, has given rise to many intricate questions and much litigation. A most interesting contribution to the mass of adjudications upon this topic, is the decision of the court in the case of the St. Louis Ins. Co. v. St. Louis, etc. R. Co. This was a suit brought by the St. Louis Ins. Co., assignee of Meir & Co., to recover the value of certain cotton shipped at St. Louis, in 1873, for Liverpool, under agreements between Meir & Co. and a fast freight line known as the Erie and Pacific Dispatch. The cotton was shipped by dispatch over the Vandalia Line, thence over the lines of the Pittsburg, Cincinnati & St. Louis, the Atlantic & Great Western and the Erie Railroad Companies. It was burned at Jersey City while in the custody of the Erie Railroad. The Vandalia Line did not execute a bill of lading, but way-billed the freight from St. Louis to Indianapolis, and there delivered it in good order to the Pittsburg, Cincinnati & St. Louis Company. The main question presented by the case is whether the Vandalia line was responsible for the safety of the cotton after delivery to another carrier. Its liability was asserted by the owners of the property in question upon the ground that it, and other railroads, had an arrangement with the Erie & Pacific Dispatch, and with each other, whereby a through rate was established for the whole route. Such an arrangement, it was contended, made railroad companies partners as to third persons. This court does not decide whether the Vandalia line could, or could not, take the benefit of the special exception in the bill of lading given by the Erie & Pacific Dispatch to Meir & Co., but assumed, for purposes of decision, that Meir & Co. were not bound under proof by any special terms which that instrument contained. The court then holds that a mere decision of established through rates by rail roads among themselves on the basis of distance only (each road bearing the expenses of its own route and of transportation over it), is not of itself sufficient to make these roads partners, or to bind any one of them as a special contract, to transport the cotton beyond its own line. The Erie & Pacific Dispatch is liable, under its contracts, for the safety of the cotton on the whole route, but each railroad is responsible only for its own negligence.

An important decision was also rendered by the court in the case of Francis Barton v. John Barbour, receiver, a case involving the liability of a receiver to suits in the courts of another State than the one whose court appointed him. It is held that where a court of one State has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty by carrying on business to which the property is adapted, a court of another State has no jurisdiction to entertain such suit against such receiver for cause of action arising in the State in which he was appointed and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty in respect to such property, or for any services performed or materials furnished such receiver in carrying on such business.

POWERS OF PARTNERS.

I.

So large a proportion of the business of the world is conducted by means of partnerships, that the law, regulating and governing associations for such purposes, is one of unusual importance, and must continue always to attract careful attention at the hands of lawyers engaged in active practice. Attention has been directed recently in this JOURNAL, in two learned articles, to the law regulating the powers and liabilities of surviving partners and of dormant partners;[1] and it is our purpose now to supplement the articles referred to by reviewing the law regulating the powers of partners in general.

The very nature of a partnership makes evident the necessity which exists, that one partner should be held to represent all, possessed of a power to bind his copartners in all transactions which concern the partnership. To deny the existence of this power, and to require the express assent of each copartner to be given as a condition precedent to the transaction of any partnership business, is so to cripple the relation of partners as to deprive it of much of its usefulness. Hence we find it laid down as an elementary principle underlying the whole law of partnership, that one partner is to be considered as the agent of all his copartners, with a power as such to bind them in matters which legitimately pertain to the partnership business.[2] An implied power is held to exist in each to bind all the others in all matters within the scope of the partnership business.[3] Of course, one partner's power to bind another is limited to partnership transactions, and does not extend to other and distinct affairs.[4] But so assured is the power of one partner to bind his copartners, within the scope of the partnership business, and so necessary is it to the proper carrying on of the business, that this power should exist, that the principle even clothes the partner with the right to bind his copartners, within the scope of such business, so long as the relation continues, notwithstanding their dissent and refusal to agree to the transaction involved.[5] And so far as third persons are concerned, the private arrangements between the partners, contained in the articles of partnership, limiting and restricting the usual powers possessed by partners engaged in that kind of business, can not be allowed any force or effect as against them, provided they had no notice of such limitations.[6] Third persons dealing with a

[1] 13 Cent. L. J. 142, 161; Ibid. 382.

[2] Sage v. Sherman, 2 N.Y. 417; London Savings Fund Society v. Hagerstown Savings Bank, 36 Pa. St. 498; Edwards v. Tracy, 62 Pa. St. 374; Congdon v. Morgan, 13 S. C. (N. S.) 190.

[3] Selden v. Bank of Commerce, 3 Minn. 166; Mauldin v. Branch Bank at Mobile, 2 Ala. 502; Johnston v. Dutton, 27 Ala. 245; Chandler v. Sherman, 16 Fla. 99; Breckinridge v. Shrieve, 4 Dana (Ky.), 376, 377; Heirn v. McCaughan, 32 Miss. 17; Faler v. Jordan, 44 Miss. 283; Cadwallader v. Kroesen, 22 Md. 200; Chemung Canal Bank v. Bradner, 44 N. Y. 680; Knowlton v. Reed, 38 Me. 246; Fletcher v. Ingram, 46 Wis. 191.

[4] Croughton v. Forrest, 17 Mo. 131; Eastman v. Cooper, 15 Pick. 276, 290; Jones v. O'Farrell, 1 Nevada, 354; Cayton v. Hardy, 27 Mo. 536; Goodman v. White, 3 Cushman, 163; Goode v. Linecum, 1 How. (Miss.) 281; Livingstone v. Roosevelt, 4 Johns. 251; Mercien v. Mack, 10 Wend. 461; Nichols v. Hughes, 2 Bailey, 109.

[5] Wilkins v. Pearce, 5 Denio, 541.

[6] Beck v. Martin, 2 McMullan, 260; Winship v. Bank of U. S., 5 Peters, 530; Bank of Kentucky v. Brooking, 2 Litt. (Ky.) 45; Miller v. Hughes, 1 Mar. (Ky.) 181; Devin v. Harris, 3 G. Green (Iowa), 186; Kelly v. Scott, 49 N. Y. 595; Tradesmen's Bank v. Astor, 11 Wend. 87; Smith v. Lusher, 5 Cowen, 689; Bank of Rochester v. Monteath, 1 Denio, 402; Frost v. Hanford, 1 E. D. Smith, 540; Edwards v. Tracy, 62 Pa. St. 374; Hoskinson v. Eliot, 62 Pa. St. 393; Barrett v. Russell, 45 Vt. 43; Perry v. Randolph, 6 S. & M. 333; Heirn v. McCaughan, 32 Miss. 17; Faler v. Jordan, 44 Miss. 283; Sage v. Sherman, 2 N. Y. 417; Ba

partnership, have a right to presume that each partner is clothed with the usual powers pertaining to a partnership formed for the transaction of that particular kind of business; but if they have actual notice that those powers are limited and conditioned by the articles of copartnership, they will be bound accordingly. [7]

It is settled that a general partner in a mercantile business may borrow money for the benefit of the firm, and pledge its credit therefor, unless restrained by the articles of copartnership, of which the lender has notice. [8] He possesses the power to make negotiable paper, and to give it effect by delivery. [9] He can compromise a debt due to the firm, [10] and execute a chattel mortgage to secure a debt due from the firm. [11] A managing partner has authority to permit mutual credits with other business establishments. [12] And one partner has the power to dispose of the entire firm property for any purpose within the scope of the partnership, [13] it being deemed necessary that each partner should possess the *jus disponendi* of the whole property, to the more effective carrying on of the partnership business. He can transfer the firm property to one who promises to pay the firm's debts, although such transfer is made against the protest of his copartner. [14] The transfer of the entire firm property may be made without any consultation with copartners. [15] And it has been held that one partner can bind his copartners by a submission to arbitration, where it is not necessary that the submission should be under seal. [16]

The principle has been announced in Pennsylvania, that one of two partners can give authority to a clerk to act in the name of the firm. [17] One partner may assign a debt due the firm, [18] and he has authority to release, under seal, a debt due to the partnership. [19] The authority of one partner to endorse a note in the firm name is presumed. [20] One partner has authority to accept a bill addressed to the firm; and if the acceptance is in the name of one of the partners only, yet all the members will be bound. [21] And a note, expressed to be for the firm, and executed in the name of one of its members, is held good against the firm. [22] But in order to make a note, signed in the individual name of one partner, binding upon the firm, it must appear affirmatively that it was given and received as a firm note, binding on all the partners. [23] But the law, of course, implies authority to execute notes, only where from the nature of the partnership, the authority is necessary for the success of its business, or where the exercise of such power is according to usage and custom. [24] Where two lawyers, being general partners in the practice of law, collected money for a client, and one of them spent it, and afterward, to repay money borrowed by himself to meet his client's

ker v. Mann, 5 Bush, 675; Johnson v. Bernheim, 76 N. C. 139.

7 Radcliffe v. Varner, 55 Ga. 427; Knox v. Buffington, 50 Iowa, 320; Pollock v. Williams, 42 Miss. 88.

8 Church v. Sparrow, 5 Wend. 223; Miller v. Manice, 6 Hill, 115, 119; Roney v. Buckland, 4 Nevada, 45; Stockwell v. Dillingham, 50 Me. 442; Beaman v. Whitney, 20 Me. 413; Bascom v. Young, 7 Mo. 1; Leffler v. Rice, 44 Ind. 103; Dillon v. McRae, 40 Ga. 107; Kleinhaus v. Generous, 25 Ohio St. 617; McKee v. Hamilton, 33 Ohio St. 7; Winship v. Bank of U. S., 5 Peters, 530; Steel v. Jennings, Cheves L. 183.

9 Faler v. Jordan, 44 Miss. 283; Smith v. Lusher, 5 Cow. 688; Beaman v. Whitney, 20 Me. 413; Jemison v. Dearing, 41 Ala. 283; Hickman v. Kunkle, 27 Mo. 401; Burgess v. Northern Bank of Kentucky, 4 Bush, 604; Zuel v. Bowen, 78 Ill. 234; Wright v. Brosseau, 73 Ill. 381; Ensminger v. Marvin, 5 Blackf. 210; Miller v. Hines, 15 Ga. 197; Potter v. Price, 3 Pitts, 136.

10 Cunningham v. Littlefield, 1 Edw. Ch. 104; Patch v. Wheatland, 8 Allen, 102; Nelson v. Wheelock, 46 Ill. 25.

11 Willett v. Stringer, 17 Abb. Pr. 152; Switzer v. Mead, 5 Mich. 107; Milton v. Mosher, 7 Met. 244; Gates v. Bennett, 33 Ark. 475; Woodruff v. King, 47 Wis. 261; Nelson v. Wheelock, 46 Ill. 25.

12 Cameron v. Blackman, 39 Mich. 108.

13 Clark v. Rives, 33 Mo. 579; Cullum v. Bloodgood, 15 Ala. 34; Knowlton v. Reed, 38 Me. 246; Woodward v. Cowing, 41 Me. 9; Deckard v. Case, 5 Watts, 22; Hennessey v. Western Bank, 6 Watts & Serg. 310; Clark v. Wilson, 19 Pa. St. 414; Halsted v. Shepard, 23 Ala. 558; Arnold v. Brown, 24 Pick. 89; Fromme v. Jones, 13 Iowa, 474; Hyrschfelder v. Keyser, 5 9 Ala. 338; Anderson v. Tompkins, 1 Brock. 456; Quiner v. Marblehead Ins. Co., 10 Mass. 476, 482.

14 Grasse v. Stellwagen, 25 N. Y. 315.

15 Mabbett v. White, 12 N. Y. 444.

16 Hallack v. March, 25 Ill. 48; Southard v. Steele, 3 Monr. (Ky.) 436; Taylor v. Coryell, 12 S. & R. 243; Gay v. Waltman, 89 Pa. St. 553.

17 Tillier v. Whitehead, 1 Dallas, 269; Chidsey v. Porter, 21 Pa. St. 390.

18 Quiner v. Marblehead Ins. Co., 10 Mass. 476; Lamb v. Durant, 12 Mass. 56.

19 Pierson v. Hooker, 3 Johns. 68; Bulkley v. Dayton, 14 Johns. 387; Wells v. Evans, 20 Wend. 251; McBride v. Hagan, 1 Wend. 326; Salmon v. Davis, 4 Binn. 375.

20 McConeghy v. Kirk, 68 Pa. St. 200; Robinson v. Johnson, 1 Mo. 233.

21 Beach v. State Bank, 2 Ind. 488; Pannell v. Phillips, 55 Ga. 618. See Potter v. Dillon, 7 Mo. 228.

22 Caldwell v. Sithers, 5 Blackf. 99.

23 Hubbell v. Woolf, 15 Ind. 204.

24 Gray v. Ward, 18 Ill. 32; Dow v. Phillips, 24 Ill. 249.

draft, drew a bill on his own firm, and accepted it in the firm name, it was held that the other partner was not liable.[25] And so, a member of a firm formed for agricultural purposes, was held unable to bind his copartners by issuing commercial paper.[26] In a comparatively recent case in Wisconsin, where it was held that a law partnership was not liable upon a note made by one of the partners in the firm name, and for a firm debt, the court said that, in order to clothe one partner with power to bind his copartners by a promissory note, the exercise of such a power must be necessary for the carrying on of the business of the partnership; or it must be usual for one partner to possess such a power in similar partnerships, or the authority must have been granted by the express assent of the copartners.[27]

It has been held, where a firm, by the violation of their contract of agency, became liable to their principal for the amount of certain notes taken by them as agents, that either partner had authority, in settlement of the claim of the principal, to bind the firm by signing its name to notes as co-maker, although the execution of notes was no part of the business of the firm.[28] And where a contract is made by one partner in the name of the firm, the same being beyond the scope of the partnership, a subsequent assent thereto may be inferred from declarations or conduct of the other partners, so as to bind them.[29] Where one partner purchases property for the use of the partnership, but upon his single credit, the seller, not being aware that it was purchased for the partnership, and not even being aware of the existence of the partnership, may nevertheless hold the other partners liable when he discovers the facts, if he desires so to do.[30] Where an active partner accepted, for the firm, service of a writ against all the partners, and employed an attorney to attend to the cause, who entered a general appearance for the defendants, and submitted to a judgment against them, it was held that all the partners were concluded by his action.[31] But one partner has no implied power to enter an appearance in a suit, except for the partnership; and he can not, by an appearance, bind his copartners individually, who are not within the jurisdiction, and who have not been served with process.[32] In order to sue out an attachment in the name of the firm, one partner can execute a bond in the name of the partnership.[33]

The power of one partner to bind his copartner rests alone upon the usage of merchants, and does not amount to a rule of law in any other than commercial partnerships. In a recent case in Kentucky, the court said: "The business of a copartnership being ascertained, and the nature of the contract made by a single member, and the circumstances attending it being known, the court may generally determine as matter of law, whether the contract was within the scope of the implied powers of a partner. Not so, however, in reference to a contract made by a member of a non-commercial partnership. A partner in such a partnership does not generally possess power to bind the firm, and, consequently, the extent of his powers is not fixed by the rules of law, but each case is left to be decided upon its particular facts; and, in all such cases, in order to make out the liability of the firm, it ought to be made out affirmatively by the plaintiff, that the partner had power to make the contract in question."[34] It is held that the extent of the powers of a copartnership, or of one of its members, to bind the firm, and the liability of its members, must be determined by the law of the place where the partnership was formed, and had its place of business, although the transaction was had in another State.[35]

One partner, of course, can receive and receipt payment of firm debts.[36] And a member of a partnership formed for a special purpose, has the same power to bind his associates as if the partnership were a general one.[37] The fact that a partnership happens to be in debt, does not give one partner the right to prevent a copartner from taking pos-

[25] Breckinridge v. Shrieve, 4 Dana, 378.
[26] Hunt v. Chapin, 6 Lans. 139.
[27] Smith v. Sloan, 37 Wis. 285.
[28] Brayley v. Hedges, 52 Iowa, 623.
[29] Waller v. Keyes, 6 Vt. 257.
[30] Griffith v. Buffum, 22 Vt. 181; Bisel v. Hobbs, 6 Blackf. 479.
[31] Bennett v. Stickney, 17 Vt. 531.
[32] Phelps v. Brewer, 9 Cush. 390.
[33] Lessee of Wilson v. Smith, 8 Ga. 551.
[34] Judge v. Braswell, 13 Bush, 67.
[35] Cutler v. Thomas, 25 Vt. 73; Hastings v. Hopkinson, 28 Vt. 108.
[36] Yandis v. Lefavour, 2 Blackf. 371.
[37] Hoskinson v. Eliot, 62 Pa. St. 393.

session of the partnership property.[38] And where one partner contracts a debt, representing that it is for the benefit of the firm, if the contract was within the scope of the business, the firm will be liable, whether the representation was true or false.[39] And, in short, the admissions made by one partner while engaged in the partnership business, are admissible in evidence against the firm.[40] Of course, the admissions of one partner do not bind the copartners as to matters which are foreign to the purposes of the partnership.[41]

Passing to the powers which partners do not possess, it may be remarked that the general rule is, that one partner has no right to sue his copartner in an action at law, and during the continuance of the partnership, concerning any matters which pertain to the partnership.[42] But an action between partners may be maintained where the cause of action is distinct from the partnership accounts.[43] And in Crater v. Bininger,[44] the New York Court of Appeals declared that there was no rule of law forbidding one partner to sue another at law, in respect of a debt arising out of a partnership transaction, if the obligation, or contract, though relating to partnership business, was separate and distinct from all other matters in question between the partners, and could be determined without going into the partnership accounts. If partners, by an express agreement, separate a distinct matter from the partnership dealing, and one expressly agrees to pay the other a specific sum for that matter, *assumpsit* will lie on that contract, although the matter arises from their partnership dealings.[45] Where one copartner furnishes another with funds, which the latter ought to have furnished as a part of the capital stock, the former may recover the same in *assumpsit*, before the final settlement of the partnership business.[46] And if one copartner makes a note payable to the other, for the use of the firm, the latter may recover thereon at law.[47] An action at law may also be maintained by one partner against the other for damages occasioned by a breach of the articles of copartnership.[48] In a case in New Hampshire it was held that money lent by one partner to another, for the purpose of launching the partnership, could be recovered in an action at law, provided the matter was not so blended with the partnership accounts as necessarily to require an accounting, as upon the dissolution of a copartnership, to ascertain whether the sum be due or not.[49] And a partner may maintain an action against a copartner, to recover his individual funds, received by the copartner, as his agent, and commingled, without his consent, with the partnership funds.[50] In fine, one may sue his copartner upon any agreement which is not so far a partnership matter as to involve the partnership accounts.[51] It is settled that one partner has no power to confess judgment against his copartner,[52] and if he undertakes to do so, the confession of judgment is valid only against the partner who makes the confession.[53] But no one can object to such a confession of judgment except the other part-

[38] Carithers v. Jarrell, 20 Ga. 842.

[39] Stockwell v. Dillingham, 50 Me. 442.

[40] Henslee v. Cannefax, 49 Mo. 295; Smitha v. Cureton, 31 Ala. 652; Jemison v. Minor, 34 Ala. 33; Jameson v. Franklin, 6 How. (Miss.) 376; Faler v. Jordan, 44 Miss. 283; Converse v. Shambaugh, 4 Neb. 378; Pierce v. Wood, 23 N. H. 520; Webster v. Stearns, 44 N. H. 498; Ensminger v. Marvin, 5 Blackf. 210; Odiorne v. Maxcy, 15 Mass. 39.

[41] Heffron v. Hanaford, 40 Mich. 305.

[42] McSherry v. Brooks, 46 Md. 103; Myrick v. Dame, 9 Cush. 248; Treadwell v. Brown, 41 N. H. 12; Burns v. Nottingham, 60 Ill. 531; Lane v. Tyler, 49 Me. 252; Pico v. Cuyas; 47 Cal. 174; Lawrence v. Clark, 9 Dana, 257; Gibson v. Moore, 6 N. H. 547; Judd v. Wilson, 6 Vt. 185; Spear v. Newell, 13 Vt. 288; Lyon v. Malone, 4 Porter, 497; Morrow v. Riley, 15 Ala. 710; Murdock v. Martin, 12 S. & M. 660; Page v. Thompson, 33 Ind. 137; Briggs v. Dougherty, 48 Ind. 247.

[43] Howard v. France, 43 N. Y. 593; Whitehill v. Shickle, 43 Mo. 537; Seaman v. Johnson, 46 Mo. 111; Wicks v. Lippman, 13 Nev. 490. See also Buckner v. Ries, 34 Mo. 357; Byrd v. Fox, 8 Mo. 574.

[44] 45 N. Y. 545.

[45] Collamer v. Foster, 26 Vt. 574; Gridley v. Dole, 4 N. Y. 483.

[46] Wright v. Eastman, 44 Me. 220.

[47] Scott v. Campbell, 30 Ala. 728; Grigsby v. Nance, 3 Ala. 347; Sturges v. Swift, 32 Miss. 239; Anderson v. Robertson, 32 Miss. 241.

[48] Terry v. Carter, 25 Miss. 168.

[49] Currier v. Rowe, 46 N. H. 72.

[50] Paine v. Moore, 6 Ala. 129.

[51] Lane v. Tyler, 49 Me. 252.

[52] Grazebrook v. McCreedie, 9 Wend. 437; Mills v. Dickson, 6 Rich. 492; Sloo v. State Bank, 1 Scam. 428; Burney v. Le Gal, 19 Barb. 592; Everson v. Gehrman, 10 How. Pr. 301; Bridenbecker v. Mason, 16 How. Pr. 203; Rhodes v. Amsinck, 38 Md. 345; Grier v. Hood, 25 Pa. St. 430; Bitzer v. Shunk, 1 W. & S. 340; Shedd v. Bank of Brattleboro, 32 Vt. 709; Elliott v. Holbrook, 33 Ala. 659; Soper v. Fry, 37 Mich. 236; Banks' Appeal, 36 Pa. St. 458; Barlow v. Reno, 1 Blackf. 252; McKee v. Bank, 7 Ohio, 2d Part, 175.

[53] North v. Mudge, 13 Iowa, 496; Christy v. Sherman, 10 Iowa, 535; Rhodes v. Amsinck, 38 Md. 345.

ner.[54] Where one partner confessed judgment, it was held that a revival of the judgment by the attorney of all the partners, cured the irregularity.[55] To warrant a confession of judgment, it is held that the other partners must first have been brought into court by a regular service of process.[56] It is also settled as a general rule of law, that one partner has no power to make a general assignment of the partnership property for the benefit of creditors.[57] Such a power is not considered within the contemplation of an ordinary partnership contract. As has been said by the Supreme Court of Ohio: "It is not a power to act as agent of the copartnership in carrying on its business, but a power to appoint an agent, and to clothe him with all the powers of the partners."[58] This general rule is not, however, without its exception. And it is held that if one partner absconds, the copartner is authorized to make such an assignment.[59] So, if one is absent, having relinquished all control and management.[60] So, too, when one partner is absent, and there are reasonable grounds for inferring that it was intended to vest such power in the copartner.[61] If a general assignment is made by one partner in the presence of his copartner, and with his consent, the latter will, in contemplation of law, be deemed to have executed the instrument of assignment.[62] As we have already shown, there are some cases which hold that a parol submission to arbitration by one partner binds his copartner. But the general rule is that one partner can not submit to arbitration any matter which concerns the partnership.[63] And while one partner can not make a general assignment, yet the assignment, if made, is not void, but voidable, and may be ratified by the copartner.[64] And the same principle holds in reference to a submission to arbitration.[65]

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54 Grier v. Hood, 25 Pa. St. 430.
55 Cash v. Tozer, 1 W. & S. 519.
56 Crane v. French, 1 Wend. 311; Stoutenburgh v. Vandenburgh, 7 How. Pr. 229; Lambert v. Converse, 22 How. Pr. 265; Richardson v. Fuller, 2 Oregon, 179.
57 Deming v. Colt, 3 Sand. 284; Kimball v. Hamilton Fire Ins. Co., 8 Bosw. 495; Fisher v. Murray, 1 E. D. Smith, 541; Hitchcock v. St. John, 1 Hoff. Ch. 512; Kelly v. Baker, 2 Hilt. 531; Haggerty v. Granger, 15 How. Pr. 243; Coppe v. Bowles, 42 Barb. 87; Holland v. Drake, 29 Ohio St. 441; Coakley v. Weil, 47 Md. 277; Hughes v. Ellison, 5 Mo. 463; Hook v. Stone, 34 Mo. 329; Dana v. Lull, 17 Vt. 390; Brooks v. Sullivan, 32 Wis. 444; Peirpont v. Graham, 4 Wash. 232; Egberts v. Wood, 3 Paige, 517; Bull v. Harris, 18 Ky. 199; Dickinson v. Legarie, 1 Desauss. 537, 540.
58 Holland v. Drake, 29 Ohio St. 441.
59 Palmer v. Myers, 43 Barb. 509; s. c. 29 How. Pr. 8; Kelly v. Baker, 2 Hilton, 531.
60 Kemp v. Carney, 3 Duer, 1.
61 Stein v. La Dow, 13 Minn. 412.
62 Brooks v. Sullivan, 32 Wis. 444.
63 St. Martin v. Thrasher, 40 Vt. 460; Buchoz v. Grandjean, 1 Mich. 367; Harrington v. Highan, 13 Barb. 660; Karthaus v. Ferrer, 1 Pet. 222; Buchanan v. Curry, 19 Johns. 137; S.ead v. Salt, 3 Bing. 101; Hatton v. Royle, 3 H. & N. 500.
64 Sheldon v. Smith, 28 Barb. 593.
65 Becker v. Boon, 61 N. Y. 317.

FELLOW-SERVANT IN SAME COMMON EMPLOYMENT.

The line of adjudications settling the doctrine that a master is not liable to a servant for an injury resulting from the negligence of a fellow-servant engaged in a common employment is almost unbroken.[1] But many cases arise in which it becomes extremely difficult to determine just what relations to each other, and to their master, will constitute two persons fellow-servants within the meaning of the rule. The purpose of this article is the consideration of some of these cases. Redfield has defined fellow-servants within the meaning of the rule as follows: "All the servants of the same master engaged in carrying forward the common enterprise, although in different departments widely separated, or strictly subordinate to others, are to be regarded as fellow-servants, bound by the terms

1 Blake v. Maine Central R. Co., 70 Me. 60; 35 Am. Rep. 297; Beaulieu v. Portland Co., 48 Me. 295; Lawler v. Androscoggin, 62 Me. 463; 16 Am. Rep. 492; Warner v. Erie R. Co., 39 N. Y. 469; Ziegler v. Day, 123 Mass. 152; Priestly v. Fowler, 3 Mees. & W. 1; Murray v. South Carolina R. Co., 1 McMullen, 385; Cooley on Torts, 541; Summerhags v. Kansas, etc. R. Co., 2 Col. 484; Gartland v. Toledo, etc. R. Co., 67 Ill. 498; Toledo, etc. R. Co. v. Durkin, 76 Ill. 395; Columbus, etc. R. Co. v. Troesch, 68 Ill. 545; Lehigh Valley, etc. R. Co. v. Jones, 86 Pa. St. 432; Brabbits, etc. R. Co. v. Chicago, etc. R. Co., 38 Wis. 289; Shultz v. Chicago, etc. R. Co., 48 Wis. 375; Besel v. New York, etc. R. Co., 70 N. Y. 171; Sammon v. New York, etc. R. Co., 62 N. Y. 251; Hofnagle v. New York, etc. R. Co., 55 N. Y. 608; McGowan v. St. Louis, etc. R. Co., 61 Mo. 258; Gormley v. Vulcan Iron Co., 61 Mo. 492; Cagney v. Hannibal, 69 Mo. 416; Colton v. Richards, 123 Mass. 484; Sullivan v. M. & M. R. Co., 11 Iowa, 421; Johnson v. Boston, 148 Mass. 114.

of their employment to run the hazard of any negligence of any of the number, so far as it operates to their detriment."[2] So far as the first part of this definition is concerned, "servants of the same master," it seems that the cases are in reasonable accord. Though persons may be associated together in their work, still, unless they are the servants of a common master, the relation of fellow-servants will not exist.[3] But when we come to interpret the words, "engaged in carrying forward the common enterprise," difficulty arises. Parties may be engaged in the same common enterprise, and yet, as their efforts are directed to different immediate results, and confined to different departments of the same business, they may rarely or never see each other, or come in contact. Are such to be considered fellow-servants within the rule? In the case of Farwell v. Boston, etc., R. Co.,[4] which has long been regarded as the leading case upon the subject in this country, it was held that they are. There the plaintiff was an engineer, and was injured in consequence of the negligence of a switchman. "The master," said Chief Justice Shaw, "is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connexion with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments can not create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant."

[2] 1 Redf. on Railways, sec. 131.

[3] Warburton v. Great Western R. Co., L. R. 2 Exch. 30; Turner v. Great Eastern R. Co., 33 L. T. R. (N. S.) 431.

[4] 4 Met. 49.

It can not be said, however, that the doctrine as above laid down by Mr. Redfield and Chief Justice Shaw, has met with general recognition in this country. An important distinction is made on the basis of association in the work, between the person injured and the party by whose negligence the injury was produced. This in many cases is made the test of fellowship, on the ground that the real basis of the rule is the possibility of mutual overlooking and precautions, and that these can, in the nature of things, be presumed to extend no further than the circle of fellow-servants with whom the employee comes in contact.[5]

This doctrine is admirably illustrated and developed in a series of Illinois cases, which culminated in Chicago, etc. R. Co. v. Moranda.[6] There the plaintiff's intestate was foreman of a party of track repairers, and was killed by a lump of coal carelessly thrown from a passing engine. It was held that the plaintiff was entitled to recover. The earlier cases are in consonance with this adjudication, and are followed by it. The circumstances of

[5] Chicago, etc. R. Co. v. Moranda, 93 Ill. 302; 10 Cent. L. J. 348; 34 Am. Rep. 168; Nashville, etc. R. Co. v. Carroll, 6 Heisk. 347; Besel v. New York, etc. R. Co., 70 N. Y. 171; Greenleaf v. Illinois Central R. Co., 29 Iowa, 14; 4 Am. Rep. 181; Kroy v. Chicago, etc. R. Co., 32 Iowa, 357; Buzzell v. Laconia Manfg. Co., 48 Me. 113; Snow v. Housatonic R. Co., 8 Allen, 441; Gilman v. Eastern R. Co. 10 Allen, 233; s. c. 13 Allen, 433; Ford v. Fitchburg R. Co., 110 Mass. 241; 14 Am. Rep. 598; Brabbits v. Chicago, etc. R. Co., 38 Wis. 298; Harper v. R. Co., 47 Mo. 567; Porter v. Hannibal, etc. R. Co., 71 Mo. 66; Thompson v. Drymala (Minn.), 1 N. W. R. 255; Warner v. Erie R. Co., 39 N. Y. 468; Laning v. New York, etc. R. Co., 49 N. Y. 522; s. c. 10 Am. Rep. 417.

[6] 93 Ill. 302; 10 Cent. L. J. 348; 34 Am. Rep. 168. Followed by Chicago, etc. R. Co. v. Henry, 7 Bradw. 322, in which it was held that one loading a freight car and a switch-tender and a brakeman, whose duty it was to couple and uncouple cars in the defendant's yard, were not fellow-servants, in such a sense as to preclude the next of kin of the switchman from recovering damages for his death in consequence of the negligent loading of the cars. See also Valtez v. Ohio, etc. R. Co., 85 Ill. 500; Chicago, etc. R. Co. v. Shannon, 43 Ill. 338; Schooner Norway v. Jensen, 52 Ill. 373; Illinois Central R. Co. v. Welsh, 52 Ill. 183; Chicago, etc. R. Co. v. Jackson, 55 Ill. 492; s. c., 8 Am. R. 661; Chicago, etc. R. Co. v. Gregory, 58 Ill. 272; Ryan v. Chicago, etc. R. Co., 60 Ill. 171; s. c., 14 Am. R. 32; Toledo, etc. R. Co. v. Conroy, 61 Ill. 162; s. c., 68 Ill. 560; Chicago, etc. R Co. v. Taylor, 69 Ill. 461; s. c., 8 Am. R. 641; Illinois Central R. Co. v. Patterson, 69 Ill. 650; Toledo, etc. R. Co. v. Fredericks, 71 Ill. 294; Pittsburgh, etc. R. Co. v. Powers, 74 Ill. 341; Toledo, etc. R Co. v. Ingraham, 77 Ill. 309; Toledo, etc. R. Co. v. O'Connor, 77 Ill. 391; Toledo, etc. R. Co. v. Moore, 77 Ill. 217; Chicago, etc. R. Co. v. McLallen, 84 Ill. 109.

each case vary somewhat of course, but they all reach the same general conclusion. In Chicago, etc. R. Co. v. Swett,[7] the fireman of a locomotive was killed by reason of the negligence of a track-repairer. In Chicago, etc. R. Co. v. Gregory,[8] the fireman on a passenger train was killed by a "mail-catcher," improvidently placed too near the track by other servants of the company. In Toledo, etc. R. Co. v. O'Connor,[9] a track-repairer was injured by the negligence of the engineer of a passing train. In these cases it was held that the plaintiff was entitled to recover; that the relation of fellow-servant did not exist, because of the lack of association together in the common employment. Where, however, this element of association does exist in the case, it has been held by that court that the servant can not recover of the master for an injury consequent upon the negligence of a fellow-servant. Thus, where the person injured was one of several servants of the defendant railroad engaged in adjusting a turn-table, when he was injured by the negligence of the others so engaged with him;[10] and where the injured was a laborer on a wood train, and the injury was the result of the negligence of the engineer and conductor in running the train;[11] and, again, where the plaintiff was a laborer on a construction train, and was injured by the neglect of the engineer and conductor;[12] and where the injured was one of a "repair gang" working at a station or yard, and was hurt in consequence of the negligence of the engineer of a switch-engine, which was constantly engaged at that yard;[13] in these instances it was held that the injured and the person whose negligence caused the injury were fellow-servants in such a sense as to bar the right of action. A careful examination of these cases, and a comparison of them with those cited above, will, I think, sustain the view that the distinction between them rests upon the existence or non-existence of what Mr. Justice Dickey, in Moranda's Case,[14] cited above, calls "personal consociation in their ordinary duties" between the person injured and the person whose negligence caused the injury.[15] Nor is the doctrine confined to Illinois. In Fuller v. Jewett,[16] the New York Court of Appeals held that the engineer on a railway locomotive was not the fellow-servant of the master mechanic in the repair shop in such a sense as to deprive him of the right of action for injuries consequent upon the explosion of a defective boiler which they had negligently omitted to repair.

In Pennsylvania, a draftsman in the defendant's locomotive works was held not to be the fellow-servant of some carpenters engaged in making repairs and doing odd jobs about the premises.[17]

In Iowa, a railway brakeman is held not to be the fellow-servant of the employees whose business it was to have the cars inspected, and who had neglected to do so, in consequence of which he was injured.[18] In Missouri, a brakeman is held not to be the fellow-servant of the section foreman, whose duty it was to keep the road bed in repair, and in consequence of whose negligence he was injured.[19] In Maine[20] a similar doctrine prevails. But in Mississippi it was held that a conductor upon a railroad train could not recover damages for an injury consequent upon the negligence of track repairers, because they were fellow-servants.[21]

Another variation of the rule as stated by Mr. Redfield, occurs where the master has committed the entire control and management

[7] 45 Ill. 197.
[8] 58 Ill. 272.
[9] 77 Ill. 391.
[10] Horner v. Illinois Cent. R. Co., 15 Ill. 550.
[11] Illinois Cent. R. Co. v. Cox, 21 Ill. 23.
[12] Chicago, etc. R. Co. v. Keefe, 48 Ill. 108.
[13] Chicago, etc. R. Co. v. Murphy, 53 Ill. 336; 5 Am. Rep. 48.
[14] Chicago, etc. R. Co. v. Moranda, 93 Ill. 302; 10 Cent. L. J. 348.
[15] See also St. Louis, etc. R. Co. v. Britz, 72 Ill. 256; Toledo, etc. R. Co. v. Durkin, 76 Ill. 395; Chicago, etc. R. Co. v. Rush, 84 Ill. 571; Valtez v. Ohio, etc. R. Co., 85 Ill. 500.
[16] 80 N. Y. 46; 36 Am. Rep. 575. See, also, Flike v. Boston, etc. R. Co., 53 N. Y. 549; 13 Am. Rep. 545; Booth v. Boston, etc. R. Co., 73 N. Y. 38; 29 Am. Rep. 97; Mehan v. Syracuse, etc. R. Co., 73 N. Y. 585; Stevenson v. Jewett, 16 Hun, 210.
[17] Baird v. Pettit, 70 Pa. St. 477.
[18] Braun v. Chicago, etc. R. Co., 53 Iowa, 595. See also Greenleaf v. Illinois Cent. R. Co., 29 Iowa, 14; 4 Am. R. 181; Kroy v. Chicago, etc. R. Co., 32 Iowa, 357.
[19] Lewis v. St. Louis, etc. R. Co., 59 Me. 495; 21 Am. R. 385. See also Harper v. Railroad, 47 Mo. 567; 4 Am. R. 353.
[20] Shanny v. Androscoggin Mills, 66 Me. 420. See also Buzzell v. Laconia Mfg. Co., 48 Me. 113.
[21] Howd v. Mississippi Cent. R. Co., 50 Miss. 178; New Orleans, etc. R. Co. v. Hughes, 49 Miss. 258.

of the work in question to the hands of a foreman or superintendent. An agent with such powers is not considered the fellow-servant of the ordinary employees of the establishment, and they are not debarred from their right of action for injuries occasioned through his negligence. Under such circumstances it is looked upon as the negligence of the master himself. [22] Whether the master has so surrendered the charge of his business to an agent, is a question of fact for a jury. [23] "Where," says Mr. Wharton, "the employer leaves everything in the hands of a middleman, reserving to himself no discretion, then the middleman's negligence is the master's negligence, for which the latter is liable." [24] What is necessary to constitute a person such "middleman," within the meaning of this rule is not so clear, and neither is the required degree of completeness of the necessary surrender of the business. Mere inferiority in grade and authority of the servant injured, to the one by whose negligence the injury is caused, makes no difference. [25] Nor the fact that the servant injured is under the direction of the negligent employee and bound to obey his orders and instructions. [26] General superintendence and authority over certain other emyloyees is not sufficient. [27] The middleman, or superior servant, must have virtual and substantial control of the business, including the power to employ and discharge employees, and to do all else necessary to its conduct. [28]

[22] Grizzle v. Frost, 3 Foster & Fin. 622; Gormley v. Vulcan Iron Works, 61 Mo. 492; Harper v. Indianapolis, etc. R. Co., 47 Mo. 567; Lewis v. St. Louis, etc. R. Co., 59 Mo. 495; Brothers v. Cartter, 52 Mo. 372; Shearm. & Redf. Negl. § 102: Wharton Negl., 222; Mullan v. Philadelphia, etc. Steam Co., 78 Pa. St. 245.

[23] Mullan v. Philadelphia, etc. Steamship Co., 78 Pa. St. 25; 21 Am. Rep. 2.

[24] Wharton's Negligence, § 229; see, also, Grizzle v. Frost, 3 Foster & Fin. 622.

[25] Shearman & Redfield on Negligence, § 100; Blake v. Maine Central R. Co., 70 Me. 60; 35 Am. R. 297; Feltham v. England, L. R. 2 Q. B. 33; McAndrew v. Burn, 39 N. J. 115; Warner v. Erie R. Co., 39 N. Y 468; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432.

[26] Lawler v. Androscoggin R. Co., 62 Me. 463; 16 Am. R. 492, 497, note; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; McGowan v. St. Louis, etc. R. Co., 61 Mo. 528; *contra*, Mann v. Oriental Print Works, 11 R. I. 152.

[27] Wilson v. Merry, L. R. 1 Scotch & Div. App. 326.

[28] Peterson v. Whitebreast Coal Co., 50 Iowa, 673; 32 Am. R. 143; Corcoran v. Holbrook, 59 N. Y. 517; 17 Am. R. 369; Murphy v. Smith, 19 C. B. (N. S.) 361; Laning v. New York, etc. R. Co., 49 N. Y. 521; 10 Am. R. 417.

Interesting questions have sometimes arisen, where the employee injured was a minor, and there was a consequent taint of invalidity in the contract. The adult employee is presumed to have undertaken the natural and ordinary risks of the employment as a part of his contract. But naturally it is questionable whether a minor, who can ordinarily make no valid contract, can be held by an implied undertaking. Thus the employment of a boy only fifteen years of age, in the hazardous occupation of a brakeman, unless he had sufficient discretion to comprehend and guard against the dangers of such employment, when fully explained to him, would not place him in the position of an employee, so as to preclude a recovery for injuries suffered from the negligence of a co-employee. [29] In Gartland v. Toledo, etc. R. Co., [30] however, it was held that a minor who, while in the service of a railway company, under an express contract, receives an injury through the negligence of a co-employee in the same line of duty, can not recover therefor of the company on the ground that his express contract, which implied an undertaking of the natural and ordinary risks of the service, is voidable only and not void.

The frequent union of different railroad companies in their operations at certain points, and the consequent contact into which their respective servants are brought, have given rise to some intricate questions. It seems, however, that the relation of servant inheres in the element of control. Thus, where two railroad companies have a joint staff of signal men, and one of them gets injured through the negligence of the private engine driver of company A, such company will not be liable; because, although the injured man is the servant of A and B, and the engine driver is the servant of A only, yet they were engaged in a common pursuit so far as company A was concerned, although the signalman was also engaged in an additional and further pursuit on behalf of B. [31] But where one of two companies

[29] Hamilton v. Galveston, etc. R. Co., 54 Tex. 562. And see Railroad v. Miller, 49 Tex. 322, 51 Tex. 274; Coombes v. New Bedford Cordage Co., 102 Mass. 572; Hill v. Gust, 55 Ind. 45; 2 Thomp. Neg., 977, sec. 8, *et seq.*

[30] 67 Ill. 498.

[31] Swainson v. N. E. R. Co., 25 W. R. 676.

has the user of the other's station, but not the control of its servants employed on such station, one of whom is injured by the negligence of the company having such right of user, the rule does not apply.[32] And where one railroad company leases another its track, and the trains of the lessee are allowed to run over such track, subject to the rules, orders and control of the lessor, such lessor will be regarded as a common master, and the employees of the two companies as fellow-servants.[33]

The *bona fide* existence of the relation of master and servant is necessary to the operation of the rule. Thus, a servant who engages temporarily in work for another on the false representation that his master had directed it, does not thereby become the servant of the other, so as to be remediless for an injury by the negligence of the latter's servant.[34] The risks which the servant is presumed to undertake by virtue of his contract of employment, are the ordinary perils, incident to it, to himself directly. Consequently, it has been held that the rule will not be extended so as to prevent him from recovering consequential damages to himself resulting from an injury to his wife, caused by the negligence of a co-employee. Such risks are not within the purview of the implied assumption of risks in the contract for service.[35]

Wm. L. Murfree, Jr.

St. Louis, Mo.

[32] Warburton v. G. W. R. Co., L. R. 2 Ex. 30; Turner v. G. E. R. Co., 33 L. T. R. (N. S.) 431.
[33] Chicago, etc. R. Co. v. Clark, 2 Bradw. 596.
[34] Kelly v. Johnson, 128 Mass. 530; 35 Am. R. 398.
[35] Gannon v. Housatonic, etc. R. Co., 112 Mass. 234.

BANKING — FIDUCIARY DEPOSIT—BANKER'S LIEN—NOTICE.

CENTRAL NATIONAL BANK v. CONNECTICUT MUTUAL LIFE INS. CO.

Supreme Court of the United States, October Term, 1881.

1. Although the relation between a bank and its depositor is that merely of debtor and creditor, if the money deposited belonged to a third person and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account.

2. The contract between the bank and the depositor is that the former will pay according to the checks of the latter, and when drawn in proper form, the bank is bound to presume, in case the account is kept in the name of the depositor or trustee, or other fiduciary character, that the trustee is, in the course of lawfully performing his duty, and to honor them accordingly; but when against such a bank account the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefiit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist, in whole or in part, of funds held by him in a trust relation.

3. That so long as trust property can be traced and followed into other property into which it has been converted, the latter remains subject to the trust, and that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own, are established doctrines of equity, and apply in every case of a trust relation, and to moneys deposited in a bank account, and the debts thereby created, as well as to every other description of property.

4. A banker's lien ordinarily attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement express or implied, or conduct inconsistent with its assertion. But it can not be permitted to prevail against the equity of the beneficial owner, of which the bank had otice, either actual or construct ive.

5. When a bank account is opened in the name of a depositor, as general agent, and it is known to the bank that be is the agent of an insurance company; that conducting its agency is his chief business; that the account was opened to facilitate that business, and used as a means of accumulating the premiums on policies collected by him for it, and of making payment to it by checks; the bank is chargeable with notice of the equitable rights of the insurance company, although the depositor deposited other moneys in the same account and drew checks upon it for his private use. And the insurance company may enforce by bill in equity its beneficial ownership therein against the bank, claiming a lien upon the balance thereof for a debt due to it from the depositor, contracted for his individual use.

6. A National bank, in voluntary liquidation under sec. 5220 of the Revised Statutes, is not thereby dissolved as a corporation, but may sue and be sued, by name, for the purpose of winding up its business; and it is no defense to a suit by a creditor upon a disputed claim, that the creditor has also filed a creditor's bill under sec. 2 of the act of June 30, 1876, authorizing the appointment of receivers of National banks, and for other purposes, to enforce the individual liability of its shareholders.

7. Pleas in equity must allege matters of fact, and not mere conclusions of law, and if not traversable for that reason, or have been filed irregularly, for lack of the affidavit of the party, and certificate of counsel required by the 31st rule, may be disregarded.

8. When an equity cause has been heard upon the merits, upon bill, answer and proofs taken, as upon issue perfected, the want of a formal replication can not be assigned as error upon appeal.

Appeal from the Circuit Court of the United States for the District of Maryland.

Mr. Justice MATTHEWS delivered the opinion of the court:

The Connecticut Mutual Life Insurance Company of Hartford, in the year 1864, appointed A. H. Dillon, Jr., its general agent for the territory consisting of the States of Maryland. Delaware, West Virginia, and the District of Columbia. He opened an office at No. 8 South street, Baltimore, conspicuously designated by signs as his place of business as general agent of the Connecticut Mutual Life Ins. Co. It was his duty, among others, to collect and receive premiums on policies issued by the company, from persons residing within his territory, and remit the same to the company at Hartford. This he usually did twice a month, finally accounting for the business of each month at its close. The mode of remitting was by checks upon a Baltimore bank to the order of the secretary of the company. To this end he at first opened an account with John S. Gittings & Co., transferred afterwards to the Chesapeake Bank, and on April 1, 1871, to the appellant, a National bank, then recently organized, whose banking house was across the street from his office. The account was designated on its books as follows: "Dr. Central National Bank in account with A. H. Dillon, Jr., general agent. Cr." To the credit of this account he deposited from time to time premiums collected for the insurance company, and remitted twice a month his checks, signed by him as general agent, and payable to the order of Jacob L. Greene, secretary of the appellee. When the premiums were paid by the checks of others, they were indorsed by him as general agent and deposited to the credit of this account. In such instances an indorsement in this form was required by the bank. Dillon also deposited to the credit of this account, from time to time, various amounts of money received by him from other sources than from premiums belonging to the appellee; and drew upon this account checks for money, applied and paid to his own use. The aggregate of the deposits made, as shown in this account, from the beginning till it was closed, amount to $470,753.05. There were drawn against it, in all, 411 checks, of which 68 were on their face payable to the order of Greene, as secretary of the appellee, representing, however, much the larger part of the gross sum of the deposits. On June 12, 1874, this account was finally closed, with a balance, as between deposits and checks, of $11,000.86. At that date Dillon owed an amount larger than this to the insurance company, and the proof is clear that the whole balance then shown by the account, as above stated, was the proceeds of collections of premiums made by him as its agent.

His current deposits of premiums in this account included his own commissions as agent. Before opening this account with the Central National Bank, on March 9, 1871, Dillon had opened another account with it, in the name of his wife, Mrs. A. P. Dillon. This account was kept open until May 1, 1873, which is the date of the last entries, when it was balanced and closed. The deposits to the credit of this account were made by Dillon, and the checks were drawn by him in his wife's name. All the transactions represented in it were for his individual account. On both these accounts Dillon was, by agreement with the bank, allowed interest, which he collected for his individual use. On March 14, 1872, Dillon was in distress for money to make good his margins on some speculations in stock, and applied to O'Connor, the president of the bank, for a loan. He explained to O'Connor the nature, extent, and cause of his necessity; who, indeed, was already aware that Dillon was in the practice of stock speculation, having been interested with him in some ventures of that character. O'Connor testifies that he declined making the loan without security, when Dillon proposed his wife as security for the amount required, not to exceed $12,000, to be drawn upon checks in her name, which, if not made good in a few days, were to be taken up by a note signed by her, assuring O'Connor that certain real estate owned by her where they resided in Baltimore, with its furniture, was worth at least $15,000 or $20,000. He also urged, says O'Connor, that he kept a valuable account with the bank, and as he had never asked before for any loan, he thought he was entitled to it. The reference doubtless was to his agency account.

The loan was made, the money being paid on checks drawn in the name of Alice P. Dillon, to the amount of $13,000, on March 14th, 15th and 16th, 1872. These checks were debited to the bank account in her name, and constituted an overdraft of $12,067.14. On April 2, 1872, the bank discounted Mrs. Dillon's note for $12,000, and carried the proceeds to the credit of this account, in order to change the form of the debt. This note was renewed from time to time, the interest being paid in some instances by Dillon's check as general agent, charged to the account kept by him in that name. It was reduced at one time by a payment of $2,000, paid in money. It was then carried in the same way until December 11th, 1873, when the note of Mrs. Dillon for $10,000 was given, dated November 29th, 1873, at six months, falling due June 1, 1874. This note was signed by Dillon and his wife, in their own handwriting, both as makers and indorsers. The discount upon it, and the interest accrued on the prior note, overdue for some time, of which it was the renewal, making in all $333.34, was paid to the bank by Dillon's check as general agent. The account in the name of Mrs. Dillon was balanced on May 1, 1873, by two entries of $12,000 each, representing the debt as it then stood, and that account was closed. The note thereafter appeared only in the discount ledger, until it was charged up, as hereafter stated. It was expressed to be payable at the Central National Bank of Baltimore. The same day this note was given, Nov. 29, 1873, an agreement was made in writing between the bank, by resolution of the directors, and Dillon and his wife, "that in consideration of

Alice P. Dillon being a stockholder in this bank, and of A. H. Dillon, Jr., being a customer of the bank, their note for $10,000, dated November 29th, 1873, at six months, be discounted at six per cent. per annum, provided only that it be agreed in writing between the makers and indorsers of said note and the bank, that at the maturity of the note $5,000 must be paid, and a new note at six months, to be discounted at six per cent., which at its maturity must be paid in full, being in full payment of the loan."

In addition to these two accounts there was a third, entitled on the books of the bank, "A. H. Dillon, Jr.," spoken of in the testimony as his individual account. The first entry is dated Oct. 15, 1873; the last Dec. 11, 1873. There are eight items on each side, amounting to $28,337.50. In the first three items it is testified that Dillon had no interest at all. They represent transactions made by him for the bank itself. The last item in the account is $10,000, being proceeds of his note discounted, which were used to take up a prior one, then matured. On June 1, 1874, the note given by Dillon and his wife for $10,000, dated Nov. 29, 1873, at six months, became due and was not paid. By order of the bank it was that day charged to Dillon in his account as general agent. In ignorance of that fact, he continued to make deposits in that account and draw checks upon it, till June 12, 1874, when it was closed, showing a credit balance at that date, if the note of $10,000 was not properly chargeable, of $11,000.86. On June 10, 1874, Dillon drew his check as general agent on the bank for $8,000 to the order of Greene, the secretary of the insurance company, and remitted it to him at Hartford. On June 13th it was presented to the bank for payment and payment refused, on the ground that there were not funds to the credit of the drawee sufficient to pay it.

In the settlement of his agency accounts with the company for May and June, 1874, he was allowed a credit for the amount of this balance in the Central Bank, $11,000.86, and paid in addition, in full of his account to June 10, $4,550.66. On June 11, the directors of the bank, by resolution, recite the agreement made in respect to the $10,000 note, on Nov. 29, 1873, when it was discounted; that it had not been complied with; that the note was made payable at the bank; and declare that "this board approve of the act of the acting cashier in charging said note in full to the account and funds of A. H. Dillon, Jr., general agent," etc. On July 18, 1874, the insurance company filed a bill in equity in the Circuit Court of Baltimore City against the bank to recover the balance, which it alleged remained in the account of A. H. Dillon, Jr., general agent, $11,000.86, claiming it to be a fund, received by him in his fiduciary character, as its agent, which they had a right to follow and reclaim as against the bank.

To this bill the bank appeared and answered, denying its equity.

The insurance company filed an amended bill on March 4, 1875, in which it repeated the allegations of the original bill, and further averred that the defendant bank had taken proceedings under the National bank act to wind up its business and cease to act as a National bank in the City of Baltimore, and that if it be permitted to do so, distributing its assets among its stockholders, the complainant will have no remedy except by a multiplicity of suits against individual stockholders, many of whom are not within the jurisdiction. It therefore prays, in addition to an account and a declaration that the fund in question is a trust fund, of which the complainant is beneficial owner, that an injunction may be granted restraining the bank from paying to its stockholders its assets without retaining a sufficient amount to satisfy the complainant's demand.

To the amended bill the defendant filed what are designated as pleas, as follows: 1. That the plaintiff is not in any sense a creditor of the defendant. 2. That there never was, nor is, any privity between the plaintiff and the defendant as to the various matters alleged in the bill. 3. That the court had no jurisdiction as to the matters alleged, the remedy, if any, being complete and adequate at law.

And afterwards an additional plea: 4. That under the provisions of the acts of Congress, in reference to National banks, it is exempted from the process of injunction as prayed for.

By the amended bill A. H. Dillon, Jr., was made a party defendant. He appeared and filed his answer to the original bill, but having been lost or mislaid, it is not contained in the transcript of the record. Subsequently, on April 10, 1877, the cause was removed from the State court to the circuit court of the United States, on the petition of the defendant, the Central National Bank.

The bank, on May 23, 1878, filed a motion to dismiss the bill, on the grounds: 1. That the bank, by a vote of its shareholders, owning two-thirds of its stock, taken July 15, 1874, had gone into liquidation, in pursuance of sections 5220, 5221 and 5222 of the Revised Statutes, and had thereby become dissolved. 2. And that the complainant, on June 8, 1878, had filed in the circuit court of the United States its bill of complaint, by virtue of sec. 2, ch. 156, of an act of Congress approved June 30, 1876, entitled "An act authorizing the appointment of receivers of National banks, and for other purposes," praying process against the persons who were shareholders thereof at the time the same went into voluntary liquidation, and seeking the enforcement of the same demand sought to be enforced in this case, which is still pending.

This motion was overruled. The cause having been set down for rehearing, the complainant moved for leave to file a general replication to the original answer, *nunc pro tunc*, and also filed a replication to defendant's first plea, which motions were granted; and to deny the legal sufficiency of the defendant's 2d and 3d pleas, setting the said two pleas for argument, which was overruled.

The motion to dismiss the bill, on the ground that the bank had gone into liquidation and was thereby dissolved, was renewed on June 10, 1878, with the additional averment, that in the meantime all its property and assets had been distributed among its shareholders, and that the bank was wholly and finally closed, and had ceased to have a corporate existence. This motion was overruled, as having been filed after the cause had been argued and submitted, and after the court had orally pronounced its opinion. And on the same day a decree was passed reciting that the cause standing ready for hearing, and having been argued and submitted upon the bill, answer, pleadings and other proceedings and evidence in the cause, and decreeing payment by the bank to the complainant of the amount of the fund claimed, with interest. From this decree the bank prosecutes this appeal.

The contention of the appellant, in opposition to the decree below, upon the merits, is that the account of A. H. Dillon. Jr., general agent, with the bank, was an individual account with him as a depositor, which created the relation of debtor and creditor between them, and to which no other party was or could be privy; that the style in which it was kept, of general agent, was merely a *descriptio personæ*, and furnished no indication that the money deposited belonged to the depositor in any fiduciary capacity; that it described merely the business in which he was engaged, as that of a general agency, for whomsoever might employ him; that in point of fact the account embraced deposits from various sources, and was used as a medium for payments of every description, according to the will of the depositor; that the bank had no notice of any equitable claim of the complainant, nor of the facts on which its claim rests; that, consequently, it had the right to treat the account as a dealing with Dillon individually, in which, so far as the bank was concerned, no one else had any interest, legally or equitably, and subject to its lien as a banker, for any overdue obligation of the depositor.

It is claimed further, in support of the bank's position, that the discount of the note afterwards charged to this account, was made originally upon the faith and credit that the latter was Dillon's individual property. But this we find to be distinctly and fully negatived by the circumstances in proof. There was a considerable balance to the credit of this account when the original debt was contracted, and at each time when it was renewed; but at no time does it appear that the suggestion was made that it should be applied, in whole or in part, to pay or reduce the indebtedness. The debt was first charged in the account kept in the name of Mrs. Dillon, and never appeared in the other, till it was finally charged up for payment. In the original conversation that resulted in the agreement for the loan, O'Connor, the president of the bank, demanded security, and was satisfied with the responsibility of Mrs. Dillon, as the supposed owner of their residence in Baltimore; and it was not until O'Connor learned that this had been conveyed to another, that he conceived the idea of charging the note, when it should become due, if it remained unpaid, to the account of Dillon, as general agent. The existence of this account as a profitable one to the bank was alleged as a reason by Dillon why he should have the accommodation, but it was not pledged for the payment of the loan, either in express terms, or by any acts or conduct from which such an intention can be inferred. And no such claim is made by the directors of the bank, either in their resolution of November 29, 1873, authorizing the discount of the last six-months note, or that of June 11, 1874, justifying the act of the cashier in finally charging it up to the account of Dillon, as general agent.

We find it also to be fully proven that the bank knew that Dillon was the agent for the insurance company; that it was his business and duty to collect and remit to it the premiums on policies of life insurance as they accrued; that the bank account in his name as general agent was opened in that way to be used for that purpose; that in point of fact such premiums were collected and deposited for accumulation to be remitted, and were remitted by checks on that account, and that they constituted much the larger part of the fund which entered into it.

It will be observed that the question arising here is not what the rights of the parties would be if the bank, having no knowledge of the character of the account, except what might be inferred from the use of the words "general agent" at its head, the note had been taken up by Dillon's check upon that account. Here the attempt is made, with the actual knowledge which we find imputable to the bank, and without Dillon's assent, to pay itself his overdue note out of a fund for which, as agent of the insurance company, he was bound to account to it. In the case of Duncan v. Jaudon, 15 Wall. 165, this court decided that a banker lending money to a person, for his private use, on the security of stocks, the certificates of which showed that he held them as trustee for another, was chargeable, as a party to the breach of trust, for the value of the trust property converted, and cite with approbation the similar decision in Shaw v. Spencer, 100 Mass. 389, where the certificates were in the name of "A B, trustee," without naming a *cestui que trust*. In that case it was held that the pledgee is, by the terms of the certificate, put on inquiry as to the character and limitations of the trust, and if he accepts the pledge without inquiry, does so at his peril.

A bank account, it is true, even when it is a trust fund, and designated as such by being kept in the name of the depositor as trustee, differs from other trust funds which are permanently invested in the name of trustees for the sake of being held as such. For a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is that the former will pay

according to the checks of the latter, and when drawn in proper form the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly. But when against a bank account, designated as one kept by the depositor in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist, in whole or in part, of funds held by him in a trust relation.

In such circumstances it is merely an application of the principle of set-off, and is illustrated by the case of Bailey v. Finch, L. R. 7 Q. B. 34. There the plaintiff, as trustee of a bankrupt banking firm, sought to recover a balance of a banking account which had been overdrawn. The defendant sought to set off a balance due to him as executor of A, in which name he had another account, and proved that as residuary legatee he was beneficially entitled to this balance, the legatees being otherwise satisfied. It was held that the effect of the account being in the name of the executor, was to affect the bank with notice, if there were any equities attaching to the fund; but that under the circumstances there were no such equities as to prevent the defendant from treating the balance as a fund to which he was beneficially as well as legally entitled, and that consequently he was entitled to set it against the plaintiff's claim. Cockburn, C. J., said: "There can be no doubt that in point of law the estate and effects of the deceased testatrix passed to the defendant as executor. And although it may be for his convenience to open an account in his own name as executor instead of in his own name as a private customer, the whole effect of that is, I apprehend, to affect the bank with the knowledge of the character in which he holds the money. Therefore, if there were persons beneficially interested in that fund, the bank might be liable to be restrained by proceedings in equity from dealing with the fund as if it were one in which their customer, the defendant, were beneficially interested, absolutely without any reference to any trust or beneficial interest to which it was subject." In the same case Blackburn, J., said that opening the account as executor operated "as a notice to them, as a statement to the bank—'This account which I am opening is not my own unlimited property, but it is money which belongs to the estate which I am administering as executor; consequently there may be persons who have equitable claims upon it.' The bank would have been bound by any equity which did exist, of which they had notice at the time the bank became bankrupt."

In the case of Pannell v. Hurley, 2 Collyer New Cas. 241, the depositor, having two accounts, one in trust, the other in his own name, drew his check as trustee to pay his private debt to the banker. The Vice-Chancellor, Knight Bruce, put the case thus:

"Money is due from A to B, in trust for C. B is indebted to A on his own account. A, with knowledge of the trust, concurs with B in setting one debt against another, which is done with C's consent. Can it be a question in equity whether such a transaction can stand?"

In Bodenham v. Hoskyns, 2 DeGex, MacNaghten & Gordon, 903, the principle was stated to be one, acted upon daily by courts of equity, "according to which a person who knows another to have in his hands or under his control moneys belonging to a third person, can not deal with those moneys for his own private benefit, when the effect of that transaction is the commission of a fraud on the owner."

In the case of *Ex parte* Kingston, *In re* Gross, L. R. 6 Ch. App. 632, a county treasurer had two bank accounts, one headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The checks which he drew upon it were all headed "Police Account," and appeared to have been drawn only for county purposes. For the purposes of interest the bank treated the accounts as one account, and the interest on the balance in his favor was carried to the credit of his private account. The manager of the bank knew he was county treasurer, and understood that he had been in the habit of paying county moneys into the bank. He absconded, his private account being overdrawn, and the police account being in credit. It was held that the bank was not entitled to set off the one account against the other, but that the county magistrates could recover the balance standing to the credit of the police account. Sir W. M. James, L. J., said: "In my mind this case is infinitely stronger than those referred to during the argument, in which a similar claim on the part of bankers was disallowed; for in those cases the bankers relied on checks drawn by the customers; and if a banker receives from a customer holding a trust account a check drawn on that account, he is not in general bound to inquire whether that check was properly drawn. Here the customer has drawn no check, and the bankers are seeking to set off the balance on his private account against the balance in his favor on what they knew to be a trust account."

It is objected that the remedy of the complainant below, if any existed, is at law, and not in equity. But the contract created by the dealings in a bank account, is between the depositor and bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract, except the parties to it. There was no privity created by it, even upon the facts of the present case, as we have found them, between the bank and the insurance company. The latter would not have been liable to the bank for an overdraft by Dillon, as was decided by this court in Na-

tional Bank v. Insurance Company, 103 U. S. 783; and conversely for the balance due from the bank, no action at law upon the account could be maintained by the insurance company.

But although the relation between the bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, to whom in equity does it beneficially belong? If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account.

"It is," said Lord Justice Turner, in the case of Pennell v. Deffell, 4 DeG., McN. & G., 388, "I apprehend, an undoubted principle of this court, that as between *cestui que trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust." In the same case, Lord Justice Knight Bruce said, p. 383: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall he claimed on behalf of the *cestuis que trustent*, it must be deemed specifically theirs, as between the trustee and his executors, and the general creditors after his death on one hand, and the trust on the other." He added: "This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee or owing also to him, money in every sense his own."

Vice-Chancellor Sir W. Page Wood, in Frith v. Cartland, 2 Hem. & Mil. 420, said that Pennell v. Deffell rested upon and illustrated two established doctrines. One was that "so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust; the second is, "that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own."

The case of Pennell v. Deffell, *supra*, was the subject of comment by Fry, J., *In re* West of England and South Wales District Bank, *Ex parte* Dale & Co., L. R., 11 Ch. Div. 772. Strongly approving the decision in principle, he felt bound nevertheless, by what he considered the weight of authority, not to apply it, in the circumstances of the case before him, where there had been a mingling of trust money with individual money. He said, however: "Does it make any difference that instead of trustee and *cestui que trust*, it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in which, if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relation ship, it can be followed and separated from any money of their own."

The whole subject of this discussion was very elaborately and with much learning reviewed by the Court of Appeal in England, in the very recent case of Knatchbull v. Hallett, *In re* Hallett's estate, L. R., 13 Ch. Div. 696. It was there decided that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, although it was mixed with his own moneys; and in that particular the court overruled the opinion in *Ex parte* Dale & Co., *supra*. It was also held that the rule in Clayton's Case (1 Mer. 572), attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money; and in that particular Pennell v. Deffell was not followed. The Master of the Rolls, Sir George Jessell, showed that the modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they can not be identified by reason of the trust money being mingled with that of the trustee, then the *cestui que trust* is entitled to a charge upon the new investment to the extent of the trust money traceable into it; that there is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position; and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account. He adopts the principle of Lord Ellenborough's statement in Taylor v. Plumer, 3 M. & S., 562, that "it makes no difference in reason or law into what other form, different from the original, the change may have been made; whether it be into that of promissory notes for the security of money which was produced by the sale of the goods of the principal, as in Scott v. Surman, Willes, 400, or into other merchandise, as in Whitecomb v. Jacob, 1 Salk. 161; for the product or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." But he dissents from the application of the rule made by Lord Ellenborough, when the latter added

"which is the case when the subject is turned into money and confounded in a general mass of the same description;" for equity will follow the money, even if put into a bag or an undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule. The Court of Appeals had previously applied the very rule as here stated in the case of Birt v. Burt, reported in a note to *Ex parte* Dale & Co., L. R., 11 Ch. Div. 773.

The principle is illustrated in many cases in this country. In that of the Farmers and Mechanics' National Bank v. King, 57 Pa. St. 202, a collector of rents deposited moneys of his principal in a bank in his own name; it was attached by a creditor of the depositor, and immediately afterwards notice of ownership was given by the principal. It was held that the attaching creditor stood in the position of the depositor, and could recover only what the depositor could. The law of the case was stated by Judge Strong in the following language: "It is undeniable that equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee or agent into a *chose in action*, the legal right to it may have been changed, but equity regards the beneficial ownership. It is conceded, for the cases abundantly show it, that when the bank received the deposits, it thereby became a debtor to the depositor. The debt might have been paid in answer to his checks, and thus the liability extinguished, in the absence of interference by his principals, to whom the money belonged. But surely it can not be maintained that when the principals asserted their right to the money before its repayment, and gave notice to the bank of their ownership, and of their unwillingness that the money should be paid to the agent, his right to reclaim it had not ceased. A bank can be in no better situation than any other debtor."

The same doctrine was strongly maintained by the New York Court of Appeals in the case of Van Alen v. The American National Bank, 52 N. Y. Rep. 1. In that case it was decided that when an agent deposits in a bank to his own account the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other moneys belonging to himself; nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor. In the course of the opinion, Church, C. J., said: "It was suggested on the argument that notice to the bank by the depositor was necessary to protect the rights of the plaintiff, but this is not so. The title of the plaintiff does not depend upon whether the bank knew he had a title or not. That rested upon other facts. A notice to the bank might have prevented any transfer or the creation of a lien by the depositor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important."

This doctrine of equity is modern only in the sense of its being a consistent and logical extension of a principle originating in the very idea of trusts; for they can only be preserved by a strict enforcement of the rule that forbids one holding a trust relation from making a private use of trust property. It has been repeatedly recognized and enforced in this court. Oliver v. Piatt, 3 How. 333; May v. LeClaire, 11 Wall. 217; Duncan v. Jaudon, 15 Wall. 165; Bayne v. United States, 93 U. S. 642; United States v. State Bank, 96 U. S. 30.

The relation of Dillon to the insurance company was one of confidence and trust. He was its agent for the collection of premiums, which belonged to it no less when in his hands than before their receipt by him. He was to account for them, under its directions, and in his entire dealing with them was bound to obey its orders. He was not merely its debtor for the amount in his hands. He held the fund for the use and as the property of the company. Foley v. Hill, 2 House of Lords Cases, 35. In a direct suit between them (Dillon v. Conn. Mut. Life Ins. Co., 44 Md. 386), it was so expressly ruled, the Maryland court of appeals saying: "Dillon not only held the fiduciary relation to the company of its agent, but was acting in respect to this and all the money he collected while such agent, under specific directions as to what he should do with it,—directions which the company had the right, for its own protection and that of its policy-holders, to have specifically performed. * * * * He must, we think, be regarded and treated as a trustee, and the fund thus in his hands must be considered as so far impressed with a trust as to give a court of equity jurisdiction of the case on that ground, if on no other."

Evidently the bank had no better right than Dillon, unless it can obtain it through a banker's lien. Ordinarily that attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or conduct inconsistent with its assertion. But it can not be permitted to prevail against the equity of the beneficial owner, of which the bank has notice, either actual or constructive.

In the present case, in addition to the circumstance that the account was opened and kept by Dillon in his name as general agent, and all the presumptions properly arising upon it, we have found that other facts proven on the hearing jus

tify and require the conclusion that the bank had full knowledge of the sources of the deposits made by Dillon in this action, and of his duty to remit and account for them as agent of the insurance company. It is, consequently, chargeable with notice of the equities of the appellee.

In our opinion the equity of the case, upon the merits, was manifestly with the appellee. But the appellant has assigned other errors upon the decree which remain to be considered.

1. It is claimed that the suit while in the circuit court abated by reason of the dissolution of the defendant below as a corporate body. The Central National Bank was organized under the National bank act of 1864, and its amendments on January 16, 1871. Its articles of association provided that "this association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements and provisions of the act." On July 15, 1874, three days before the complainant's bill was filed, at a meeting of the stockholders of the bank held pursuant to law, "it was voted by the stockholders of said association owning more than two-thirds of its stock, that said association go into liquidation and be closed." It is certified by the comptroller of the currency "that the Central National Bank of Baltimore went into voluntary liquidation on July 15, 1874, under secs. 5220 and 5221 of the Revised Statutes of the United States, and on January 8, 1875, deposited legal tender notes with the treasurer of the United States for the full amount of its outstanding circulation, as provided in sec. 5222 of the Revised Statutes, whereupon the bonds deposited by the association for the purpose of securing its circulating notes were delivered to the bank, thus finally closing its connection with this department." It further appears that the bank, ceased to do any new banking business after resolving to go into liquidation; paid its depositors and other creditors, so far as their claims were admitted; reduced its assets to cash, and distributed the money among the shareholders, paying them back their capital in full with an accumulation of two per cent. premium. The bank's lease of its banking-house expired March 1, 1875, when its doors were closed, its clerks discharged, and afterwards its furniture removed and disposed of and its signs taken down. On February 1, 1875, a special authority was issued by the board of directors, authorizing the president and acting cashier to act for and do all legal acts that might become necessary in the liquidation of the business of the bank.

It is claimed that these facts show a dissolution of the corporation.

It is provided by sec. 5,186 Rev. Stat. U. S., that every national bank, duly incorporated, shall "have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law." By sec. 5,220 it is also provided that "any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." Sec. 5,221 requires that whenever a vote is taken to go into liquidation, notice of the fact shall be given to the comptroller of the currency, and publication made in newspapers, that the association is closing up its affairs and notifying its creditors to present their claims for payment. Six months thereafter is given by sec. 5,222, in which the association is required to deposit with the treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation.

It is further provided (sec. 5,224), that when that deposit has been made, the bonds deposited to secure payment of its notes shall be re-assigned to it. "And thereafter the association and its shareholders shall stand discharged from all liabilities upon its circulating notes, and their notes shall be redeemed at the treasury of the United States."

In connection with the provision of the articles of association of the Central National Bank, already noticed, these are all the provisions of law that are supposed to affect the question. It is to be observed that the sections under which the proceedings took place, which, it is claimed, put an end to the corporate existence of the bank, do not refer, in terms, to a dissolution of the corporation, and there is nothing in the language which suggests it, in the technical sense in which it is used here as a defense. The association goes into liquidation and is closed. It is required to give notice that it is closing up its affairs, and in order to do so completely and effectually, to notify its creditors to present their claims for payment. And the redemption of its bonds given to secure the payment of its circulating notes, by the required deposit of money in the treasury, is limited in its effect to a discharge of the association and its shareholders from all liability upon its circulating notes. The very purpose of the liquidation provided for, is to pay the debts of the corporation, that the remainder of the assets, being reduced to money, may be distributed among the stockholders. That distribution can not take place, with any show of justice, and according to the intent of the law, until all liabilities to creditors have been honestly met and paid. If there are claims made, which the directors of the association are not willing to acknowledge as just debts, there is nothing in the statute which is inconsistent with the right of the claimant to obtain a judicial determination of the controversy by process against the association, nor with that of the association to collect by suit debts due to it. It is clearly, we think, the intention of the law

that it should continue to exist, as a person in law, capable of suing and being sued, until its affairs and business are completely settled. The proceeding prescribed by the law seems to resemble, not the technical dissolution of a corporation, without any saving as to the common-law consequences, but rather that of the dissolution of a copartnership, which, nevertheless, continues to subsist for the purpose of liquidation and winding up its business. In the case of the Bank of Bethel v. Pahquioque Bank, 14 Wall. 383, the same question was made in reference to a national bank which, having become insolvent, by a refusal to pay its circulating notes, was put into liquidation by the comptroller of the currency, by the appointment of a receiver under other provisions of the bank act. It was there claimed, for the purpose of defeating a suit brought against the bank by name, that the appointment of the receiver, who had refused to admit and pay the plaintiff's claim, was a dissolution of the corporation. Mr. Justice Clifford, delivering the opinion of the court, recited the provisions of the law upon the subject, and said: "None of these proceedings, however, support the theory that the association ceased to exist when the receiver was appointed, nor at any time before the assets of the assocsation are fully administered, and the balance, if any, is paid to the owners of the stock of their legal representatives." p. 398. "Much aid can not be derived from authorities in the examination of this proposition, as the questionn turns chiefly, if not entirely, upon the construction of the act of Congress; and suffice it to say that we are all of the opinion that the act contains nothing in its subsequent provisions inconsistent with the theory of the plaintiffs, that the association may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs, under the provisions of the act which authorized its formation."

In that case it was argued, as in this, that as the only constitutional warrant for the existence of a national bank was its connection with the government as a fiscal agent, the severance of tha connection *ipso facto* deprived it of vitality. The same argument would render it incapable of returning to its stockholders their capital and accumulated profits. If it was a reasonable incident to its living that it should contract debts, it is equally a reasonable incident to its dissolution that it should pay them. We see no constitutional impediment that prevents it.

The same conclusion was reached by the Court of Appeals of Maryland, in the case of Ordway v. Central National Bank, 47 Md. 217. On June 30, 1876, Congress passed an act authorizing the appointment of receivers of national banks and for other purposes (19 U. S. Stat. at Large, 63), the second section of which provides that when any National banking association shall have gone into liquidation under the provisions of sec. 5220 of the Revised Statutes, the individual liability of the stockholders, provided for by sec. 5151, of said statutes, may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established. After the passage of this act, on January 8, 1878, it appears that the appellee filed in the circuit court of the United States for the District of Maryland its bill of complaint against the appellant, and against the persons who were shareholders in the bank at the time it resolved to go into liquidation, under the provisions of this section. It is urged that this statute is itself evidence that the bank was dissolved as a corporation by the proceedings in liquidation, and that the pendency of the bill authorized by it was a bar to any further proceedings in the present suit. We see nothing in the act of 1876 inconsistent with the continued existence of the bank as a corporation for the purposes of liquidation. Indeed, it seems to confirm the idea that for the purpose of being sued, in order judicially to determine the question of disputed liability, it continues to exist, and the remedy against the shareholders is added as a means of execution, in case the corporate assets have in the meantime been otherwise applied or shown to have been insufficient. It is a cumulative remedy and against other persons, and can not be considered as an objection to the rendition of the present decree.

It is also assigned for error that the appellee failed to set down for argument or traverse the pleas of the defendant, as required by the 38th equity rule; but the pleas in this case were irregularly filed and defective, under the 31st rule, for lack of the affidavit of the defendant that they were not interposed for delay, and of the certificate of counsel that they were, in his opinion, well founded in point of law, and may well have been disregarded on that account. Besides, the second and third pleas were such only in form, as they merely alleged matters of law and not of fact. "The office of a plea," said Lord Eldon, in Rowe v. Teed, 15 Ves. 377, "generally, is not to deny the equity, but to bring forward a fact which, if true, displaces it." The first plea is open to the same objection; for, although it appears to negative the averment of a matter of fact essential to the complainant's case—that he was a creditor of the defendant—yet really it merely denies the conclusion of law, to be drawn from the whole of the case as stated in the bill. Every matter, therefore, covered by the pleas, was necessarily embraced in the hearing upon the bill, answer, and proofs. There was no issue tendered on matter of fact that was left undecided, and no matter of law affecting the merits that was not adjudged.

It is also assigned for error that the complainant

failed to file a replication to the answer. Leave to do so was granted by the court, on the complainant's motion; and although the transcript does not show that it was done, the parties went to the hearing as if it had been done, submitting the case upon the proofs which had been taken, as though a formal issue had been perfected. The same objection was made in the cases of Clements v. Moore, 6 Wall. 310, and Laber v. Cooper, 7 Wall. 569, under circumstances not distinguishable from the present, and for the reasons there stated it is overruled.

The absence of an answer by Dillon, and the want of an issue upon it, is also assigned for error. The transcript shows that an answer had been filed by Dillon, but had been lost or mislaid. This fact having been called to the attention of the court below, before the hearing, the circuit judge announced that he would not proceed with the hearing without the answer, if the respondent's solicitor, then present, objected to the hearing for that reason. No objection was made, and the hearing properly proceeded. For aught that appears, Dillon's answer may have been a confession of the truth of the allegations of the bill.

We find no error in the record, and the decree is affirmed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.

October Term, 1880.

JURY TRIAL — STIPULATION — SEALED VERDICT.—The stipulation "that the jury might, when they had agreed on their verdict, if the court should not be in session, sign and seal the same, and deliver the same to the officer in charge and disperse," was equivalent to an agreement by both parties, on the retirement of the jury, that the court might, when the sealed verdict was handed in by the officer, open it in the absence of the jury and reduce it to proper form, if necessary. The stipulation was, also, a waiver of the right to poll the jury if they should not be in court. The issue to be tried was on a plea of *nil debet*. This admitted the execution of the bond, and required the jury only to find the amount due. If anything was found to be due, the law fixed the form of the verdict and judgment. The jury found there was $7,500 due on the debt and one cent damages for the detention. That finding, reduced to proper form, was in favor of the plaintiff for the penalty of the bond, to be discharged on payment of $7,500. All the court did was to enter the verdict in that form. In doing so it only gave legal effect to what the jury unmistakably found. This was allowable, both under section 954 of the Revised Statutes and the practice act of Illinois. In error to the Circuit Court of the United States for the Northern District of Illinois. Affirmed. Opinion by Mr. Chief Justice WAITE. —*Koon v. Phœnix Mut. Life Ins. Co.*

JURISDICTION — WRIT OF ERROR — CERTIFICATE OF DIVISION OF OPINION.—All the questions certified in this case are answered in the negative, on the authority of Weightman v. Clark, 103 U. S. 256. As the judgment was in accordance with this opinion, it would have been in all respects affirmed if the case had been brought here by writ of error. We find no such writ, however, and on that account dismiss the suit for want of jurisdiction. Under sec. 693, Rev. Stat., final judgments of the circuit courts in civil actions, wherein there has been a division of opinion of the judges, are only reviewable here on writ of error or appeal. The act of 1802 (2 Stat. 159, chap. 31, sec. 6), which allowed the questions to be certified up before judgment, was superseded by the act of July 4, 1872. 17 Stat. 196, chap. 255, sec. 1. On a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of Illinois. Opinion by Mr. Chief Justice WAITE.— *Bartholow, Lewis & Co. v. Trustees of Schools of Randolph Co.*

USURY—NATIONAL BANK ACT.—The object of the plaintiffs in error in these suits is to have usurious interest paid a national bank on renewing a series of notes, of which those now in suit are the last, applied in satisfaction of the principal of the debt. The claim is not for interest stipulated for and included in the notes sued on, but for the application of what has actually been paid as interest to the discharge of principal. This we held in Barnet v. National Bank, 98 U. S. 555, could not be done; and in National Bank v. Gruber, 8 Weekly Notes of Cases, 119, and National Bank v. Adams, 9 Id., 472, the Supreme Court of Pennsylvania followed that case, overruling its former decisions on the same question in Lucas v. Bank, 78 Pa. St., 228, and Oberholt v. Bank, 82 Id., 490. If, therefore, we reverse the judgments for the specific errors now complained of, it would serve no useful purpose, for on the facts admitted the same general result must follow another trial. Without, therefore, considering at all the question on which the cases seem to have turned below, the judgments are affirmed. In error to the Circuit Court of the United States for the Western District of Pennsylvania. Opinion by Mr. Chief Justice WAITE.— *Driesbach v. 2d National Bank of Wilkesbarre.*

QUERIES AND ANSWERS.

QUERIES.

55. A owned a house and lot, and agreed to sell the premises to B for a price mutually agreed upon. It

was understood to be a cash transaction. B, not having the cash with him to make the payment, he and A went to C, a National bank. B drew his drafts on his banker in favor of C, the National bank, for the amount of the purchase money. A deposited his deed with C, the National bank. It was understood by A, B & C that when the drafts were paid, the deed should be delivered. After the parties separated, B alone went to C, the bank, and demanded and obtained a receipt for his drafts from C. B insured the house in his own name. The drafts of B were paid, and he checked out the money from C, and refused to accept the deed and pay for the property. What are the rights of A in the premises against B and C, the National bank?

Fort Worth, Texas. T. & C.

56. The constitutional amendment of this State passed in 1877, provides that no city "shall have power to pay or grant any extra compensation to any public officer, employee, agent, or servant, or increase the compensation of any public officer or employee, to take effect during the continuance in office of any person whose salary might be increased thereby." Our courts hold a policeman to be a public officer. The common council of the City of B are authorized to fix the salaries and compensation of the police force, but the police are appointed by a board of police commissioners, and hold their positions until removed or expelled by the board for cause. Now, the police were appointed before 1877, and were receiving $80 per month salary each, when the act took effect. In 1878 the common council reduced their salaries to $60 per month, and they stand now at that figure. Query. Can the common council restore the salaries to $80 per month without violating said amendment? B.

Bridgeport, Conn.

57. Has the faculty or board of trustees, or either of them, under the Constitution of the United States, and of Indiana, or otherwise, of the agriculteral college of a State, organized and maintained under and by virtue of the act of Congress, approved July 2, 1862, entitled, "An act donating lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," and the acts supplementary thereto, and which college is maintained by the income from such endowment, and by appropriations by the General Assembly of the State, the right to pass a regulation as follows: "No student is permitted to join, or be connected, as a member or otherwise, with any so-called Greek or other college secret society; and as a condition of admission to the University, or promotion therein, each student is required to give a written pledge that he or she will observe this regulation. A violation of this regulation and pledge forfeits the right of any student at the end of the year, and to an honorable dismissal;" in other words, have they the right to exclude persons refusing to sign the above regulation? Give authorities. INDIANA.

La Fayette, Ind.

RECENT LEGAL LITERATURE.

TEXAS REPORTS. Cases argued and decided in the Supreme Court ot the State of Texas, during part of the Tyler Term, 1880, the Galveston Term, 1881, and a part of the Austin Term, 1881. Reported by A. W. Terrell. Vol. 54. St. Louis, Mo., 1881: The Gilbert Book Co.

This volume is carefully printed, and presents a creditable appearance. The reporter's work has been faithfully done. One thing that attracted our attention, and met our approval, is the fact that the date of delivery is appended to each opinion. The most noticeable blemish in the volume is the index. This is made by reprinting the syllabi of the cases and arranging them under appropriate headings; consequently the entire index occupies over 100 pages of the 750 in the volume, and each entry in it is so long and elaborate that a consultation of it necessarily involves a loss of time. This method of making an index has the endorsement of being an almost universal custom among reporters, but that is tne only recommendation which can be claimed for it.

NOTES.

——Pending the discussion which has been evoked by Dr. Hammond's article in the *International Review*, concerning the punishabiiity of insane criminals, the following letter from Mr. Ruskin to an English journal may be found to be not uninteresting: To the Editor of the *Pall Mall Gazette*: Sir, Toward the close of the excellent article on the Taylor trial in your issue for October 31, you say that people never will be, nor ought to be, persuaded "to treat criminals simply as vermin which they destroy, and not as men who are to be punished." Certainly not, sir! Whoever talked or thought of regarding criminals "simply" as anything (or innocent people either, if there be any)? But regarding criminals complexly and accurately, they are partly men, partly vermin; what is human in them you must punish—what is vermicular, abolish. Anything between—if you can find it—I wish you joy of, and hope you may be able to preserve it to society. Insane persons, horses, dogs or cats, become vermin when they become dangerous. I am sorry for darling Fido, but there is no question about what is to be done with him. Yet, I assure you, sir, insanity is a tender point with me. One of my best friends has just gone mad, and all the rest say I am mad myself. But, if ever I murder anybody—and, indeed, there are numbers of people I would like to murder—I won't say that I ought to be hanged; for I think that nobody but a bishop or a bank director can ever be rogue enough to deserve hanging; but I particularly, and with all that is left me of what I imagine to be sound mind, request that I may be immediately shot. I am, sir, your obedient servant, J. RUSKIN. Corpus Christi College, Oxford, Nov. 2, 1872.

——The following advertisement appeared in the *Albany Law Journal* for October 15. It is not stated what the population of the office consists of: LAW OFFICE FOR SALE.—Two young attorneys, about to go West, offer for sale an established office and business, furniture, library, etc., complete. Population 14,000. Fullest investigation before purchase. Address, etc.